TABLE OF CASES

	Page
Adams v. City of Milwaukee, 228 U. S. 572, 581, 583; 33 S. Ct. 610; 57 L. Ed. 971	9-10-11-12
American Federation of Labor v. American Sash & Door Co., 69 S. Ct. 258	18
Dominion Hotel, Inc. v. State of Arizona, 249 U. S. 265; 39 S. Ct. 273; 63 L. Ed. 597	9-13-14
Goesaert v. Cleary, et al., 69 S. Ct. 198	14-15-16
Laurel Hill Cemetery v. City and County of San Francisco, 216 U. S. 358, 365, 366; 30 S. Ct. 301; 54 L. Ed. 515	9 & 12-13
Lincoln Federal Labor Union No. 19129, American Federation of Labor v. Northwestern Iron and Metal Company, Vol. 93, U. S. L. Ed., Advance Sheet No. 5	18-19
Louisiana Greyhound Club v. Clancy, 119 So. 532, 120 So. 295; 49 S. Ct. 350, 50 S. Ct. 87	7-9
Paoli v. Baldwin, 31 So. 627; 159 Fla. 165	2
Radice v. New York, 264 U. S. 292, 296, 297; 44 S. Ct. 325; 68 L. Ed. 690	9 & 14
State ex rel. West Flagler Amusement Co. v. Rose, 165 So. 60; 122 Fla. 227	3
Smith v. Commonwealth of Kentucky, 275 U. S. 509; 48 S. Ct. 158; 72 L. Ed. 298	9-10

STATUTES

	Page
Florida, Laws of 1947, Chapter 23728	3-4-5 & 15
Florida, Laws of 1935, Chapter 17276	5-6

TOPICAL INDEX

A. THE FEDERAL QUESTION INVOLVED IS SUBSTANTIAL 2

1. The Florida rule as set forth in the case of State ex rel. Paoli v. Baldwin, 31 So. 2d 627, 159 Fla. 165 holds to the effect that one holding a permit or license under the Florida Racing Commission has a property right 2

2. The Florida Statute, as construed by the Supreme Court of Florida applicable at the time the racing permits were granted to the three parties involved herein, required that the dates be allocated by the Racing Commission in a fair and impartial manner. This was a valuable property right which is invaded by the act under attack 3-4-5

3. Chapter 23827 of the General Acts of the legislature of the State of Florida, 1947, is unconstitutional in that it denies equal protection of the laws and takes property without due process of the law 4

BLEED THROUGH – POOR COPY

TOPICAL INDEX—Continued

Page

B. THE FLORIDA STATUTE IS UNCONSTITUTIONAL 5

1. The act is unconstitutional on its face because it gives to one permit holder the right to select the choice competitive dates as against the rights of others 5

2. The Bill of Complaint charges a factual situation which, if true, would show that the Act is discriminatory in fact 6

3. The appellees contend that the legislature had a right to change the formula for allocating dates by rewarding the track which produced the most tax revenue to the state in a previous year 6

4. The legislature of Florida may prohibit racing but it cannot discriminate between permit holders of the same class who are on the same basis 7

5. A discussion of the Louisiana dog track case, 119 So. 535, and jurisdiction assumed by this court on Federal question involved, 49 S. Ct. 350, case No. 720, and a later opinion by this court upholding the reasonableness of the Louisiana statute, 50 S. Ct. 87, 280 U. S. 525 8-9

Page

6. The analysis of the Kentucky dog track case, of which this court took jurisdiction. 275 U. S. 509, 48 S. Ct. 158, 72 L. Ed. 298 9-10-11

7. The analysis of the decisions in which this court has taken jurisdiction (these cases are referred to in the Kentucky case above mentioned) 12-13-14

8. The recent decision of this court in Goesaert v. Cleary, et al., 69 S. Ct. 198 (decided 1948. U. S. citation not available.) in which this court said:
"The Constitution in enjoining the equal protection of the laws upon states precludes irrational discrimination as between persons or groups of persons in the incidence of a law." 14

C. FACTS ADMITTED ON A MOTION TO DISMISS 15

1. The decisions of this court above mentioned show that this court has taken jurisdiction on similar Federal questions but that the exact point involved in this case has never been decided by this court 15

TOPICAL INDEX—Continued

Page

2. The allegations of the Bill of Complaint show conclusively that there is a great discrimination, as a matter of fact, and these facts are admitted on the Motion to Dismiss 16

D. THE LABOR RELATION CASES CITED BY THE APPELLEE HAVE NO BEARING ON THIS ISSUE AND ARE NOT DETERMINATIVE OF THE ISSUE RAISED HERE 18-19

E. CONCLUSION 20

BLEED THROUGH – POOR COPY

IN THE SUPREME COURT OF THE UNITED STATES

GULFSTREAM PARK RACING ASSOCIATION, INC., a Florida corporation, and GABLES RACING ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

HIALEAH RACE COURSE, INC., a Florida corporation, and the FLORIDA STATE RACING COMMISSION, a statutory body created under the laws of the State of Florida,

Appellees.

Appeal From the Supreme Court of the State of Florida.

APPELLANTS' BRIEF AND ANSWER TO THE STATEMENT OF THE APPELLEES, HIALEAH RACE COURSE, INC., AND THE FLORIDA STATE RACING COMMISSION, OPPOSING JURISDICTION, AND IN WHICH SAID STATEMENT MOTION TO DISMISS OR AFFIRM IS INCORPORATED.

The Appellees, in response to the statement as to the jurisdiction of the United States Supreme Court filed by the Appellants, have assigned as their objections:

1. That the appeal is frivolous.

2. That there is not presented a substantial Federal question.

3. There is no Federal question involved.

An analysis of the Appellees' Brief will demonstrate clearly, from the controversial nature of the cases cited and the admission of the counsel themselves, that the appeal is not frivolous, that there is definitely a substantial Federal question involved.

The appeal is not frivolous. The Supreme Court of Florida in the case of Paoli v. Baldwin, 31 So. 2d 627, 159 Fla. 165, which is discussed at Page 20 of the Appellants' Statement, held that under the Florida State Racing law a race track trainer, holding a permit to engage in racing in Florida, did so by virtue of a special privilege but yet, said license, when once received, was a valuable property right. By the same token, prior to the enactment of the 1947 Florida statute now under attack, the Florida State Racing law had provided for a very valuable property right in each of the three permit holders who held permits for racing in South Florida. At the time these permits were granted, and millions of dollars expended in the improvement of the race tracks, the Florida law required that the dates for racing should be allocated and apportioned by the State Racing Commission in a fair and impartial manner.

BLEED THROUGH – POOR COPY

The statute itself did not define what a fair and impartial manner was but the Supreme Court of Florida in many decisions, did construe that phrase. These are the opinions which were set forth in our first statement and are, namely, State ex rel. West Flagler Amusement Co. v. Rose, 165 So. 60, 122 Fla. 227, and cases therein mentioned, and the Court said: (See page 12 of the original Statement)

> "We hold further that the duty of the state racing commission to apportion dates to the several dog tracks in Dade County in a fair and impartial manner is a duty to so "fix and set the dates for racing" that the track season, which is the period comprehended in the total number of days allowed to each track, will afford to each licensee a substantially equal opportunity for the beneficial enjoyment of its permit and the realization of its permit opportunities."

Thus we have a formula under the State Racing law of Florida under which Gulfstream Park Racing Association, Inc. and Gables Racing Association, Inc., were entitled to have the dates apportioned in a fair and impartial manner. Gulfstream Park, as alleged in the Bill, was a new track and has only been operating, after it had been out of business about five years, since 1944. The war interrupted the operation of all racing so it was not until 1946 that racing was reestablished and it was 1947 before it was on a firm basis. The Bill of Complaint, as shown in the record, charges that when there were only two tracks operating, to wit: Hialeah Race Course, Inc. and Gables Racing Association, the dates were apportioned between the two tracks in a way which was apparently satisfactory to those two tracks ,although not necessarily under the

formula set forth by the legislature. The Bill of Complaint charges that when Gulfstream Park was reorganized and rehabilitated that it was better situated, better located and had better facilities and could seat more people than Hialeah and Gables Racing Association combined. It was further charged that the State Racing Commission had, in an illegal and arbitrary manner, awarded the choice winter dates, that is, the forty (40) days in the height of the winter season of South Florida, to Hialeah, so that said Hialeah Race Course, Inc., could enjoy Forty full days of lucrative racing and that it had awarded to each of the other tracks Forty days, the first series beginning on or about December 1st, and the last series of Forty days beginning about March 3rd. It was charged, as a matter of fact, that this was an unfair and not an impartial distribution of dates because it only afforded Gulfstream Park and Gables Racing Association the opportunity to run for Twenty days when racing was really justified. In other words, it only gave to these two tracks an opportunity of enjoying a 50% benefit as against the full forty days of lucrative racing dates awarded to Hialeah. The Bill charged sufficient facts to show that, as a matter of fact, the action of the State Racing Commission in giving Hialeah the middle Forty days, was an admitted discrimination and that the revenue derived therefrom gave an extra benefit of hundreds of thousands of dollars to the track which enjoyed these middle dates. It was then alleged in the Bill that just as litigation was about to be instituted by Gulfstream Park against the State Racing Commission to demand a fair and impartial allotment of the dates, the legislature of the State of Florida enacted Chapter 23728 of the General Acts of the legislature of the State of Florida in which the legislature set up a new formula for the allocation of dates to the three tracks in-

BLEED THROUGH – POOR COPY

volved which the Appellants herein contend was unconstitutional.

The charge made in the bill was that it was unconstitutional for two reasons:

It was unconstitutional on its face because the bill purported to give to the race track which had produced the highest state revenue for the previous year its choice of the dates. In other words, it was a reward regardless of whether or not any of the tracks had had an equal opportunity to run on similar dates to see what track could produce the greatest revenue for the State of Florida. That arbitrary and discriminatory feature appears on the face of the Act itself and therefore we say that the Act was unconstitutional. It was then charged in the Bill that, as a matter of fact, the Act operated in such a way as against Gulfstream Park and Gables Racing Association that it was discriminatory in fact in that it was actually a scheme by the legislature to freeze the dates which Hialeah Park had previously enjoyed through the arbitrary and illegal action of the State Racing Commission.

Gulfstream Park had a new modern track and even in the first few years of its operation it was clear to see, as charged in the Bill, that the location of the track, its modern aspects and its general development, had made that track an immediate competitor of Hialeah. Hialeah had always enjoyed the lucrative winter dates. Gulfstream Park and Gables Racing Association, Inc., want to enjoy those lucrative dates on a fair and impartial basis. At the time Gulfstream Park was organized and hundreds of thousands of dollars spent, the State of Florida had, in effect, issued a notice to the world that anyone who com-

plied with the requirements of the state law and started a racing plant, would be entitled to allocation of dates on a fair and impartial manner. There was nothing in that law which said that the oldest track would have the choice of dates but that notwithstanding, the State Racing Commission and the legislature had attempted to discriminate.

The bill specifically charges that if Gulfstream Park was given the opportunity to race in the height of the winter season on those same dates now enjoyed by Hialeah, it would produce more revenue than was produced by Hialeah Race Course, Inc.

The Appellees defend this position by claiming, as shown on Page 4 of their statement:

> "The reward, first choice, goes to the track producing the most tax revenue to the State. A competitive situation is created which encourages good management and top grade racing and the obvious beneficiaries are the racing industry, racing fans and the people of the State of Florida."

We say that this statement is facetious and, as a matter of fact, as charged in the Bill of Complaint, there is no competition and there has been no opportunity for the tracks in question to have an equal opportunity to produce revenue. The Bill charges sufficient facts which, if true, would show utter discrimination.

The legislature of the state has a right to define the type of establishments where pari-mutuel betting may be carried on. The legislature may have the right to fix the areas in which it may be carried on or it may fix the over-

BLEED THROUGH – POOR COPY

all racing season and it can supervise and regulate, or even destroy, racing. It may even say that racing may be conducted only at night time, or in the day time, or it may provide that racing may be conducted only on race tracks which are a half mile long, or a mile long, or square or oblong, or any other method, but whatever the rule is it must apply to all permit holders on the same basis. The appellees in this case have tried to confuse the issue. This is not a formula which applies to all alike but this is a formula which has as its base an utter and unfair discrimination. Hialeah Race Course, which has enjoyed the lucrative winter dates, has naturally produced the highest percentage of revenue, and this is not dependent upon their management or their drawing power, if the facts alleged in the Bill of Complaint are admitted to be true as they are for the purpose of testing this Motion.

We have already analyzed the Federal cases concerning this sort of discrimination in our original Statement of the Jurisdiction and will not repeat this analysis in this brief. However, in all fairness to the Court we would like to call attention to the case of Louisiana Greyhound Club v. Clancy, 119 So. 532, 120 So. 295, 49 S. Ct. 350, 50 S. Ct. 87., which is referred to by the Appellees on Page 10 of their Statement. The Appellees erroneously say that this court refused to take jurisdiction of that case. In that case there was an attack on a legislative Act of Louisiana which, among other things, provided that racing could not be conducted on any track measuring less than one mile. The track sought to enjoin the enforcement of said Act which applied to all tracks in Louisiana. An attack was made on several technical grounds, 1st., because it contained more than one object in the title to the act passed, 2nd, that the regulation was not within the

police power, 3rd, that there was a property loss to the track objecting, and 4th, that it deprived the association from engaging in the dog racing business. The Supreme Court of Louisiana held that the test was whether the Act was a reasonable exercise of the inherent police power of the state, or whether it was so unreasonable and arbitrary as to amount to an infringement on the property rights of the plaintiff. There was no question of any discrimination between this and any other track and there were no provisions of this Act which prevented a track owner from building a racing track of the size required, which would then be on the same basis as every other track. The Court said in the body of its Oponion (See page 535 of 119 So. Rep.):

> "It is not unreasonable to levy a license upon animal racing. Nor is it unreasonable to regulate the length of the race track or to fix the hours within which races may not be run.
>
> It may be that there was concealed a motive on the part of the Legislature to discriminate against dog racing and in favor of horse racing in fixing the hours and the length of the track, but no such motive is to be ascertained from reading the act. It makes no such discrimination. Its provisions apply alike to all animal racing."

This case was appealed to the Supreme Court of the United States, and the appeal was allowed as shown in 49 S. Ct. 350, case #720, and the Court said:

> "In this case the Court finds that probable jurisdiction has been shown, and the case is placed upon the summary docket."

BLEED THROUGH – POOR COPY

Later, upon final hearing, 50 S. Ct. 87, 280 U. S. 525, this Court entered an order affirming the decree of the Louisiana Supreme Court and quoted as authority the case of Smith v. Commonwealth of Kentucky, 275 U. S. 509, 48 S. Ct. 158, 72 L. Ed. 298, and cases cited therein. This Louisiana case should be sufficient authority to justfy this court holding that prima facie jurisdiction has been shown and that the appeal is not frivolous and that there is a substantial Federal question involved. Reference to the cases cited will be of interest to the Court. The case of Smith v. Commonwealth of Kentucky was a per curiam opinion by this court which affirmed the opinion of the Court of Appeals of the State of Kentucky, 213 Ky 648, 281 S. W. 826, and in this particular case this Court cited as authority the cases of Adams v. City of Milwaukee, 228 U. S. 572, 581, 583, 33 S. Ct. 610, 57 L. Ed. 971; Laurel Hill Cemetery v. City and County of San Francisco, 216 U. S. 358, 365, 366, 30 S. Ct. 301, 54 L. Ed. 515; Dominion Hotel v. Arizona, 249 U. S. 265, 268, 269, 39 S. Ct. 273, 63 L. Ed. 597; Radice v. New York, 264, U. S. 292, 296, 297, 44 S. Ct. 325, 68 L. Ed. 690.

From the opinion by the Court of Appeals of Kentucky the facts were as follows: Smith and others owned a tract of land near Erlanger, Kentucky, known as the Erlanger Fair Grounds on which had been constructed a race track for the running of horses. The track had been abandoned. The owners rented the premises to the Erlanger Kennel Club. They constructed a circular track within the grounds one quarter of a mile in length and equipped it for the operation of a dog track. A pool arrangement was set up which was in the nature of pari-mutuel gambling but was not under any law of the state of Kentucky. It seems that the legislature of Kentucky had provided for the opera-

tion of race tracks in the Laws of 1920, Section 1328(a). This Act of Kentucky prohibited any betting or wagering of anything of value on any horse race run or to be run or advertised, but excepted bets or wagering made "within the inclosure of a race course or track licensed by the state racing commission" during an authorized and licensed race meeting thereon. There was no provision for betting at dog tracks and the Court of Appeals of Kentucky held that the operators of the Kennel Club were prohibited by the General Act and that its patrons could not gamble or bet on dog racing under the then existing laws of Kentucky. The Court of Appeals of Kentucky did not uphold the right to discriminate among members of the same class. In other words, all operators of horse tracks within the general purview of the law of Kentucky received the same treatment and they simply held that the State of Kentucky had the right to authorize the running of horses, with wagering thereon, to supervise and to deny to dog tracks the same right. In other words, the Court of Appeals of Kentucky did not classify all animal racing as a part of the same class. This litigation started in 1926 and before dog racing became so popular throughout the United States. This case is really a moot question because practically in every state where horse racing is operating dog racing is also operating but under separate acts. However, the Supreme Court of the United States took juridiction of that decision and rendered an opinion on the merits. We will not here attempt to discuss the merits of our case over and above the fact that there is a substantial Federal question involved. We will now refer to the cases cited as authority in the per curiam decision of the Kentucky case. Adams v. City of Milwaukee, 228 U. S. 572, 581, 583, 33 S. Ct. 610, 57 L. Ed. 971 involved the constitutionality of a municipal ordinance of the City of Mil-

BLEED THROUGH – POOR COPY

waukee which prohibited shipment into the City of milk produced outside of the City unless the cows should first have been subjected to the tuberculin test and official certificate obtained. This court held that there was one Federal question involved and for that reason it took jurisdiction. The Court in its Opinion (See 33 S. Ct. 612) set forth that the said City of Milwaukee had passed an ordinance which prohibited the sale of any milk within the City drawn from diseased cows and that the ordinance authorized the health officer to remove the diseased animals to a place where they would not spread infection. The Court pointed out that it was possible to have inspection and care of animals within the City but that it could not be applied practically to animals kept outside of the city. It could only be applied to the milk drawn from such animals and brought within the city for sale, and the Court said:

> "Each animal within the City can be subjected to an individual examination, a microscopic test of samples of its milk, an inspection as to its condition of health, and the tuberculin test applied directly under the orders of the health commissioner. This is a sufficient basis for separate legislation relating to milk shipped into the city. There are other regulations covering the sale of milk drawn from cows kept within the city."

and then this Court said:

> "We concur in the conclusion of the court. The different situations of the animals require different regulations. * * * The requirements are not unreasonable; they are properly adaptive to the conditions. They are not discriminatory; they have proper relation to the purpose to be accomplished."

If we had a discrimination between owners of cows kept within the City so as to provide that the one who did the most business had to have a different type of inspection from the one who did the second largest amount of business then we would have a case strictly within the category of the one we are now appealing to this Court.

The next case referred to in the per curiam opinion in the Kentucky case is Laurel Hill Cemetery v. City and County of San Francisco, 216 U. S. 358, 30 S. Ct. 301. In this case the cemetery company owned certain land within the limits of the City and County of San Francisco. The land was dedicated for a cemetery in 1867 when it was not within the limits of the city and was a mile or two away from any dwellings or businesses. The land was acquired by the City and then later on was sold to the Plaintiff in the case for the sum of $24,139.79, which sum the city retained. The land had been used for cemetery purposes ever since that time. The city of San Francisco passed an ordinance holding that the burial of the dead within the city and county of San Francisco was dangerous to life and detrimental to the public health, and forbade further burials. This court simply held that even before the making of the constitution, the regulation of burials and the prohibition of them in certain spots, especially in crowded cities, had been familiar to the entire western world, and it was within the police power to prohibit further burials within the crowded area of a congested city. This statute and the ordinance enacted under the statute applied to all alike. If, in that case, one competitive burial company had been permitted to bury its dead for twenty-three out of the twenty-four hours of the day, and the plaintiff company was restricted to burying its dead from midnight to 1:00 A. M. in the morning, then that case

BLEED THROUGH – POOR COPY

would be similar to that involved in the appellants' litigation now before this Court.

The next case referred to in the per curiam opinion is the case of Dominion Hotel, Inc. v. State of Arizona, 249 U. S. 265, 39 S. Ct. 273. In Arizona the state statute provided that a woman could not work in a hotel for more than eight hours a day and that that eight hours must be performed during a twelve-hour period. There was an exception, however, in that this rule would not be applicable to railroad restaurants or eating houses located upon railroad rights of way and operated under or by a contract with any railroad company. The owners of the Dominion Hotel were convicted because they employed women contrary to that statute, and the owners, after conviction, pleaded the Fourteenth Amendment, and claimed that there was a discrimination. The Court said (See page 274 of 39 S. Ct.):

> "Presumably, or at least possibly, the main custom of restaurants upon railroad rights of way comes from the passengers upon trains that stop to allow them to eat. The work must be adjusted to the hours of the trains. This fact makes a practical and, it may be, an important distinction between such restaurants and others. If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines."

This decision was rendered in 1919 and still is not any

authority for discrimination between two persons of the same class. Even that decision, however, we respectfully submit, would be of doubtful authority in the light of many recent decisions of this court involving modern labor problems.

The last case referred to in the per curiam opinion is Radice v. New York, 264 U. S. 292, 44 S. Ct. 325. This case involved the New York law prohibiting the employment of females over the age of Sixteen in connection with any restaurant for more than six days or 54 hours of any one week. This case, as well as the Arizona case, would have little bearing upon the modern question of labor employment, particularly since this court has so recently spoken in the case of Goesaert v. Cleary, et al., 69 S. Ct. 198, decided December 20, 1948. (U. S. citation not available.) This decision affirmed the judgment of the United States District Court for the Eastern district of Michigan, reported in 74 F. Sup. 735. The majority opinion said:

> "While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations "which are different in fact or opinion to be treated in law as though they were the same."

The court then pointed out in the majority opinion that the State of Michigan evidently believed that if a woman was employed in a shop operated by the barmaid's husband or father that some of the moral taint accomp-

BLEED THROUGH – POOR COPY

anying a woman bartender would be removed. The court does not say to just what extent the moral taint would be removed but it said it was not made clear that Michigan had violated the equal protection of the laws clause of the Fourteenth Amendment of the United States Constitution. The dissenting opinion said that the classification made by the Michigan statute was not sound and that there was a discrimination.

The cases above mentioned are important because it shows clearly that the Supreme Court of the United States has taken jurisdiction and has considered the problems submitted. That should be sufficient answer to the Appelles' contention. However, the last mentioned case is of extreme importance because it clearly shows that the Federal courts will search in behind the wording or the face of the provisions of a state statute to determine, as a matter of fact, whether there is discrimination.

Head Note No. 4 of the Goesaert case says:

> "The equal protection clause precludes irrational discrimination as between persons or groups of persons in the incidence of a law, but does not require situations which are different in fact or opinion to be treated in law as though they were the same."

This law is sound and when applied to the case at bar it shows that there is a Federal question involved in the Florida statute now under attack. Suppose in the Michigan law, women could have served as bartenders in the bar which produced the highest state revenue from the sale of liquor but that women would be prohibited from working in the bar which only produced the second best

revenue in a given area. Suppose in the given instance the Michigan legislature had permitted the bar which did the best liquor business last year to have the exclusive right to operate between the hours of 6:00 A. M. in the morning and 2:00 A. M. the next morning, and gave to the bar which did the second best business for the previous year, and yielded the second best liquor tax return, the right to operate from 2:00 A. M. to 4:00 A. M. in the morning, and then gave to the third classification the right to operate from 4:00 A. M. in the morning to 6:00 A. M. It is possible that the public might be trained to do most of its drinking between 2:00 A. M. in the morning and 4:00 A. M., or on the other hand, between 4:00 A. M. and 6:00 A. M., and no doubt there are a few people who indulge most heavily at that time but the general mass of the public do their drinking at a more reasonable time. The same situation applies in Florida in horse racing and the Bill charges in this case that in certain periods in the middle of the winter when it is very cold in the north people are more inclined to come to Florida than they are in the early fall or the late spring. This has been the custom in Florida for many many years before horse racing was even heard of in Florida, and this is the custom in some Florida areas even today where there are no horse tracks within many miles. The Appellees have tried to place a very strange construction upon this fact and say that is purely speculative and that there is really no rhyme or reason as to why more people should be in Florida in the middle of the winter than are here in the warm spring time. They would have this court believe that it is just as possible for more people to be here in April than are here in January and February. They would have this court believe the weather conditions in the north in the winter time have very little to do with the tourist trade. They would have this court

BLEED THROUGH – POOR COPY

ignore the fact that springtime throughout most of the north, is quite pleasant. They would say this is purely speculative.

The Appellees are in a rather peculiar position. Hialeah Race Course, Inc., the recipient of the benefits, is strenuously fighting this case. They have not filed any answer, or rather are not willing to test the case upon the question of actual discrimination. It is safe to say, and we believe this court can take judicial knowledge from the fact that if there were not rank discrimination the Appellants here would not be fighting for their rights and the Hialeah Race Course would not be fighting to keep its benefits. Just why the State Racing Commission of Florida is in this case and has taken the interest it has we cannot tell. This is the first experience in any reported case where we have ever found that a State Racing Board of any kind ever took the position that it was incompetent and was unable to perform its functions in a fair and impartial manner. No doubt this could be said of many state boards but this is the first time that we have ever had a State Board admit it openly.

We think that the factual matters above set forth and the reference to the recent decision of this court, will show that this appeal is not frivolous and that it is based upon an adequate Federal question.

We assume that the court is concerned with two things, 1st. Has there been a Federal question presented? 2nd. Has this court already decided the question so that there would be no real merit in carrying this appeal through on the final argument? We submit that the cases above mentioned show that there is a real and a substan-

tial Federal question and that there has been no decision by this court on the same subject matter. The nearest approach we have ever had on it is the Louisiana case involving the length of race tracks, the Kentucky case involving the discrimination between betting on dogs and horses, and the recent Michigan case involving the discrimination between women bartenders.

Counsel for the Appellees have cited a series of recent cases beginning with Lincoln Federal Labor Union No. 19129, American Federation of Labor v. Northwestern Iron & Metal Co., which they refer to as being in Vol 93, U. S. L. Ed. Advance Sheet No. 5, which we refer to as 69 S. Ct. 251. (U. S. citation not available), and the Arizona case of American Federation of Labor v. American Sash & Door Co., 69 S. Ct. 258. Both of these cases involve the question whether or not the actions of states which provide that one may not be denied employment because of his nonmembership in the union or membership in the union on the other hand, violate the due process clause or the equal protection of the laws clause of the Fourteenth Amendment. In the Lincoln case it was contended by the union that the North Carolina and Nebraska laws denied to the union and their members equal protection of the laws, and also denied them due process of law, and also was an unjust discrimination. In the Arizona case the question was raised largely that the amendment denied to the Appellants equal protection of the law. The gist of the new rule, however, if it is a new ruling, is contained in the Lincoln case on page 257 of 69 S. Ct. Reporter, wherein this court said:

> "This Court beginning at least as early as 1934, when the Nebbia case was decided, has steadily rejected the

BLEED THROUGH – POOR COPY

due process philuosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See Nebbia v. United States, supra, 291 U. S. at pages 523, 524, 54 S. Ct. at pages 509, 510, 78 L. Ed. 940, 89 A.L.R. 1469, and West Coast Hotel Co. v. Parrish, supra, 300 U. S. at pages 392-395, 57 S. Ct. at pages 582, 583, 81 L. Ed. 703, 108 A.L.R. 1330, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

Appellants now ask us to return, at least in part, to the due process philosophy that has been deliberately discarded. Claiming that the Federal Constitution itself affords protection for union members against discrimination, they nevertheless assert that the same Constitution forbids a state from providing the same protection for non-union members. Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers."

There is a real substantial Federal question involved and we submit, therefore, that this case should be considered on its merits. Each of the cases relied upon by the Appellees have been cases where the court did hold that there was a substantial Federal question involved. It is true that a corporation may not be entitled to the benefit of that portion of the Fourteenth Amendment which grants privileges and immunities to other citizens but it is certainly entitled to due process and to the equal protection of the laws and it is entitled, just like a natural person, to complain when it has been unjustly discriminated against by a State Statute.

We respectfully contend that in our Statement of the Jurisdiction we showed a substantial Federal question supporting our position and we have not attempted to do more in this Reply than to show that the Appellees have given strained interpretations to the decisions which they have cited.

Respectfully submitted,

W. G. WARD,
Attorney for Appellant,
Gulfstream Park Racing
Association, Inc.

CHARLES A. MOREHEAD,
Attorney for Appellant,
Gables Racing Association,
Inc.